Bird's Eye View of the Wetlands Science and Regulatory Landscape

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EPA HEADQUARTERS

Outline

Rulemaking Updates
- Waters of the United States
- 401 Water Quality Certifications
- 404(g) State and Tribal Assumption

National Wetland Condition Assessment
- Background
- Updates

Rulemaking Updates:

U.S. EPA and U.S. Army Corps of Engineers Proposed Rule

Revised Definition of "Waters of the United States"

6/14/2017

Background on Definition of "Waters of the United States"

- **"Navigable waters"** are defined in Clean Water Act (CWA) as "waters of the United States, including the territorial seas"
- **Agencies' regulations and preamble language**
- **Key Supreme Court cases**: *Riverside Bayview, SWANCC, Rapanos*
- **Guidance and Rulemaking:** Agencies have been working since these Supreme Court decisions to provide clarification and predictability of waters that are – and are not – jurisdictional under the CWA
  - 2003 *SWANCC* guidance
  - 2007/8 *Rapanos* guidance
  - 2011 draft guidance (superseded by 2015 rule)
  - 2015 Clean Water Rule
  - 2019 Step 2 Proposed Rule
  - 2019 Step 1 Final Rule (proposed in 2017)

Background: Rulemaking Process

Agencies are pursuing a two-step process:

- **Step 1**: Finalization of a rule to repeal the 2015 Rule and recodify prior regulation.
  - The agencies received 770,000 comments on the Step 1 proposed rule and supplemental notice.
  - Agencies announced the final rule on September 12, 2019.
- **Step 2**: Publication of a proposed rule to revise the definition, consistent with Executive Order 13778.
  - Proposed on February 14, 2019, with public comment period closing on April 15, 2019.

Step 2: Categories of Waters Proposed to Be WOTUS

Traditional Navigable Waters (TNWs) including territorial seas

Tributaries

Certain ditches

Certain lakes and ponds

Impoundments

Adjacent wetlands

Step 2: Waters/Features Excluded from WOTUS Definition

Waters not listed as WOTUS

Groundwater

Ephemeral features and diffuse stormwater run-off

Ditches not identified as WOTUS

Prior converted cropland (PCC)

Artificially irrigated areas that would revert to upland should irrigation cease

Artificial lakes and ponds constructed in upland

Water-filled depressions created in upland incidental to mining or construction activity

Wastewater recycling structures constructed in upland

Stormwater control features constructed in upland

Waste treatment systems

Next Steps

Step 1: Final rule was published today in the *Federal Register*

- Final rule will become effective 60 days after publication

Definition of "Waters of the United States"-Recodification of Pre-Existing Rules

A Rule by the Engineers Corps and the Environmental Protection Agency on 10/22/2019

PUBLISHED DOCUMENT

Start Printed Page 56626

AGENCY:

Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency (EPA).

ACTION:

Final rule.

SUMMARY:

The Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") are publishing a final rule to repeal the 2015 Clean Water Rule: Definition of "Waters of the United States" ("2015 Rule"), which amended

DOCUMENT DETAILS

Printed version:
PDF

Publication Date:
10/22/2019

Agencies:
Department of the Army, Corps of Engineers
Environmental Protection Agency

Dates:
This rule is effective on December 23, 2019.

Effective Date:
12/23/2019

Document Type:
Rule

Next Steps

Step 2: Agencies are still in the process of reviewing the over 620,000 comments received on the proposed rule and considering those comments prior to making final decisions on the proposed definition

"Waters of the United States" Links and Contacts

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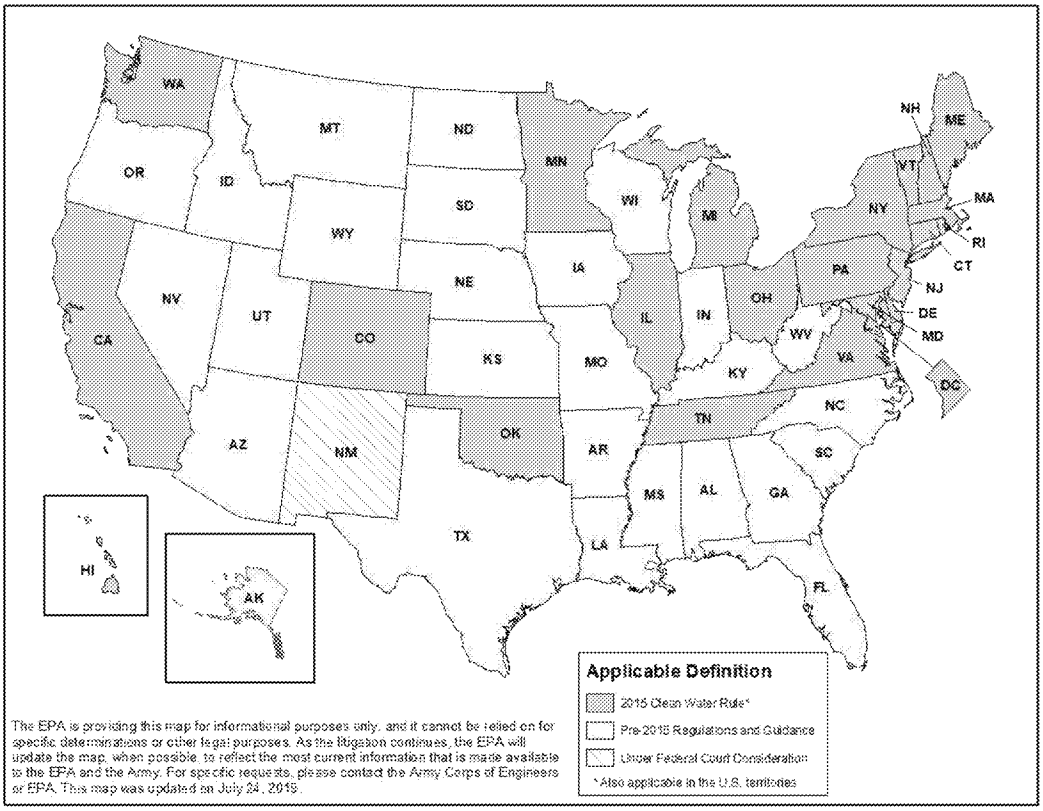
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Applicable Definition
2015 Clean Water Rule*
Pre-2015 Regulations and Guidance
Under Federal Court Consideration
* Also applicable in the U.S. territories
The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on July 24, 2015.

Rulemaking Updates:

U.S. EPA Proposed Rule

Updating Regulations on Water Quality Certification

Clean Water Act Section 401

Section 401 of the Clean Water Act (CWA) requires that:

1. any applicant for a federal license or permit
2. which may result in a discharge into waters of the United States
3. must obtain a water quality certification from the certifying authority
4. that the discharge complies with all applicable water quality requirements.

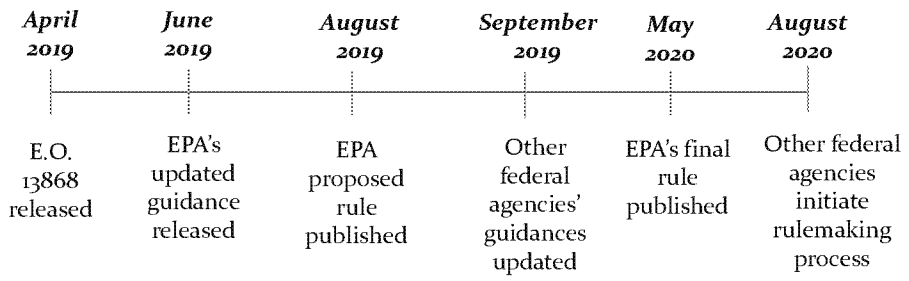
Executive Order 13868

On April 10, 2019, President Trump issued Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," which directed the EPA to propose a new rule that modernizes the agency's water quality certification regulations (40 CFR Part 121).

The main water quality certification regulation for all stakeholders is located at 40 CFR 121.

- The existing regulations were promulgated in 1971, prior to the 1972 Clean Water Act.
- Some federal agencies have additional implementation regulations on section 401.

Executive Order 13868



"Updating Regulations on Water Quality Certification"

On August 8, 2019, the EPA Administrator signed the proposed rule "Updating Regulations on Water Quality Certification" to modernize the EPA's existing regulations at 40 CFR 121 and make them consistent with the current CWA.

Key elements of the proposed rule

1. Timeline to act on a request for certification
2. Scope of certification review
3. Contents of a certification decision
4. Federal agency role in section 401
5. Requirements when EPA acts as a certifying authority
6. EPA's discretionary role in the neighboring jurisdiction context

Public Comment Period & Next Steps

The public comment period was **60** days. Comments will be considered if they were received on or before **October 21, 2019**.

Comments on the proposal are posted in **Docket ID No. EPA-HQ-OW-2019-0405.**

Agencies will review the comments received on the proposed rule and consider those comments prior to making final decisions on the proposed definition.

Additional Information

For more information on CWA section 401 and this proposed rulemaking, please visit **https://www.epa.gov/CWA-401**.

If you have any questions, please send an e-mail to **cwa401@epa.gov**.

Rulemaking Updates:

U.S. EPA Proposed Rule

CWA 404(g) State and Tribal Dredged and Fill Permit Program Regulatory Revision

6/14/2017

CWA § 404(g): Overview

Key provisions

- CWA § 404 requires that a permit be issued before dredged or fill material can be discharged into waters of the US
- CWA § 404(g) allows states and tribes to assume administration of the dredge and fill permitting program in certain waters
- A state or tribe would issue permits under state/tribal authority (not delegated), i.e., a state or tribal program must be no less stringent than the CWA and implementing regulations

EPA Goals

- Support state & tribal efforts to take the lead in managing their aquatic resources
- Facilitate state & tribal assumption efforts
- Modernize the § 404(g) regulations (not updated since 1988)

CWA § 404(g): Authorities

CWA § 404(g)

- States and tribes may assume administration of the § 404 permit and enforcement program for navigable waters of the US, except those used or susceptible to use as a means to transport interstate or foreign commerce and wetlands adjacent thereto
- US Army Corps of Engineers retains § 404 permitting authority in non-assumed waters, as well as in tribal waters when a state assumes. Corps retains-Rivers and Harbors Act § 10 permitting authority in all waters.

CWA § 404(h-l) and 40 CFR part 233 describe:

- State and tribal program assumption requirements
- EPA responsibilities: approval and oversight of assumed program
- Requirements for review and modification of state or tribal program (as necessary)

CWA § 404(g): Recent Activities

CWA § 404(g) regulation revisions

- In response to input from states and tribes, the EPA initiated a rulemaking to revise the 1988 regulations to clarify and modernize the regulations. Only two states (MI and NJ) have assumed the program.
- Rulemaking will consider recommendations from a Federal Advisory Committee Act (FACA) subcommittee in 2017 regarding which waters states and tribes may assume.
- Other issues being considered in the rulemaking include partial assumption, enforcement and compliance, mitigation, consistency with permit requirements, and technical updates.

Other activities

- The EPA is coordinating with various states interested in pursuing assumption of the program, including Florida, Maryland, Indiana, Arizona, Oregon, Minnesota, Wisconsin, and Nebraska.

CWA § 404(g): Recent Activities

Status and schedule for the 404(g) rulemaking:

- In 2018, the EPA conducted tribal consultation and held pre-proposal input meetings and webinars with tribes and states.
- States and tribes provided written pre-proposal input in early 2019 for the EPA's consideration.
- The EPA is currently developing options for the rulemaking.
- The EPA plans to issue a proposed rule in spring of 2020, and a final rule in late 2020.

Additional Information

For information about the rulemaking effort, contact:

- Kathy Hurld (hurld.kathy@epa.gov)
- Ruth Chemerys (chemerys.ruth@epa.gov)

Website:

https://www.epa.gov/cwa404g

6/14/2017

National Wetland Condition Assessment: Background and Updates

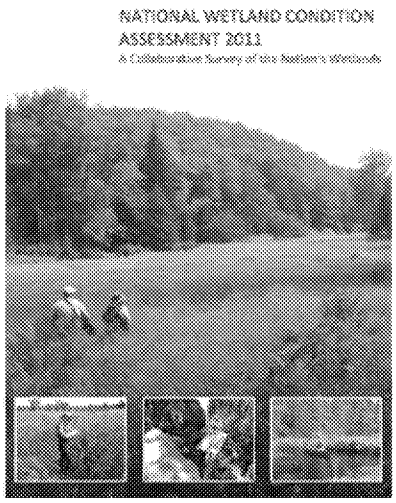
What is NWCA

National, statistically-designed assessment of wetlands in the U.S.

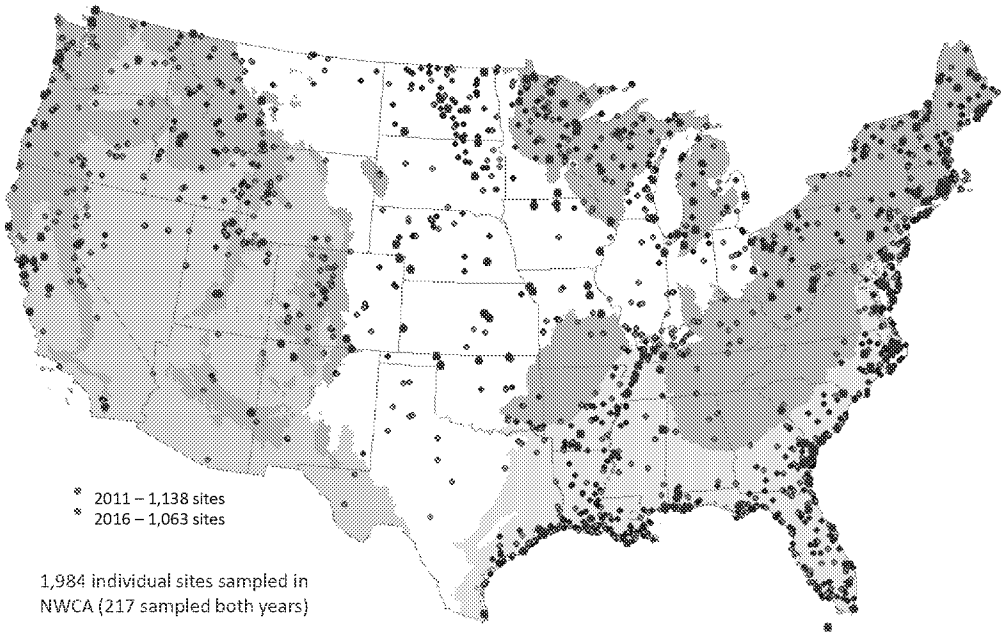
- Characterize the ecological condition of nation's wetlands and stressors associated with poor condition
- Detect and assess change to wetland condition at national and regional scales

Part of EPA's National Aquatic Resource Survey (NARS) program

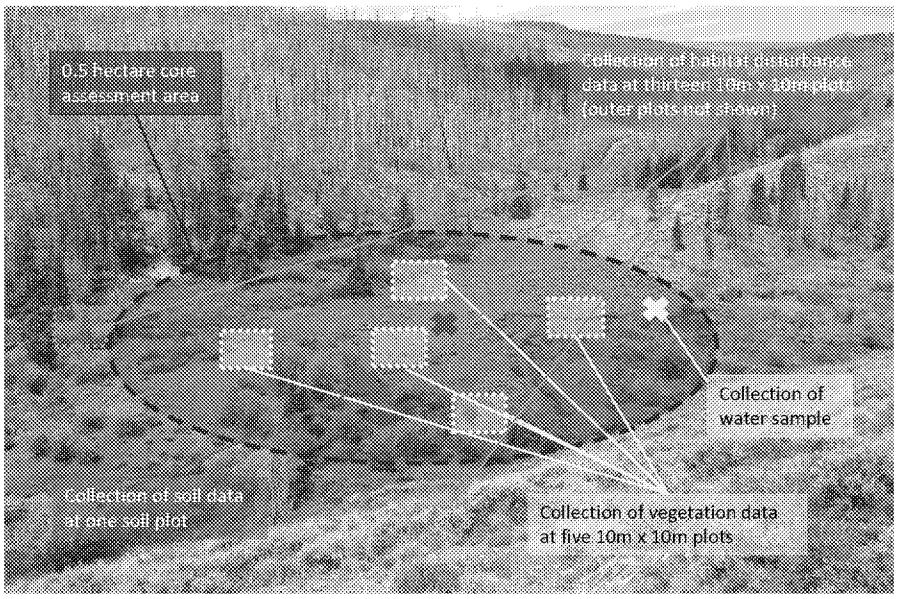
Surveys conducted in 2011, 2016, planned for 2021



Sampled Sites



Data Collected



2016 data

Preliminary data files sent out to project partners for most indicators

- Emails to project partners with files attached
- Available on NARS/NWCA Share Point site

Draft data

- Internal partner use only at this time
- Let EPA know of any issues discovered

Oct 2018	Apr 2019	Aug 2019	End of 2019
Site information AA characterization Surface water info Water chemistry	Buffer habitat Hydrology	Soil profile Soil chemistry Microcystin	Plant species cover Vegetation type and ground attributes Tree and snag data

2016 Analysis and Report

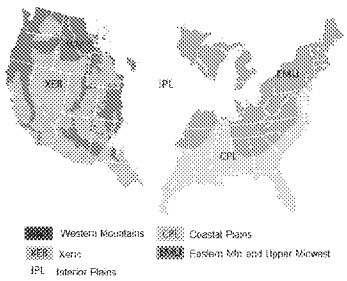
Similar to 2011

Reporting groups

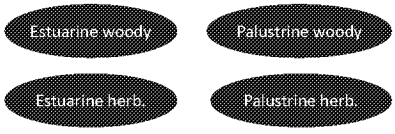
Condition / stressor indicators

- Biological condition
- Habitat disturbance
  - Vegetation alteration
  - Hydrologic alteration
- Nonnative plant stress
- Soil stress
  - Heavy metals
  - Nutrients

ECOREGIONS



WETLAND GROUPS



2021 Survey Design

Sample frame

- National Wetland Inventory digital map of U.S.
- State digital wetland map if requested

Survey design completed this fall

Site lists for 2021 distributed to states via EPA Regional Monitoring Coordinators early next year

2021 Indicators

No significant changes to vegetation, soil, water protocols

Planning changes to hydrology and buffer characterization

- Streamline and enhance consistency of data collection

Supplemental indicators?

CONSIDERATIONS FOR SUPPLEMENTAL INDICATORS

Benefit in adding indicator to NWCA

Established protocols

Feasibility

- cost (field equipment and supplies, lab)
- logistics (shipping, handling)
- time

Funding source

Analysis and interpretation plans

Indicator champion

Funding for NWCA 2021

Funds for sampling 2021 sites covered under CWA §106 Monitoring Initiative allocation in FY 2020 budget

- $8,000/site

States/Tribes apply for funds and indicate type of participation in NWCA

Guidance on applying for funds sent out through EPA Regions this winter

Decision on type of participation in NWCA needed by March 2020

Begin coordination with state agency receiving §106 funds and EPA, if haven't already

Field/Lab Options

All of the field and lab work will be done by the state/tribe (or through state led agreements)

All of the field and lab work will be done by EPA contractors

Some of the field and/or lab work will be done by the state/tribe (or through state led agreements), but not all of it

Process Improvements

Site evaluation
- Web app/tool to assist in evaluation of sites

Training
- NARS training improvement workgroup
- Reduce classroom time, enhance field portion of regional trainings
- Additional training resources (webinars, videos)
- Improve AV experience

Field app
- Significant overhaul from 2016
- Field testing starting this fall

Vegetation QA

Discussion

How would you like EPA to provide support in

- Use of NWCA data
  - What tools would be most helpful to states/tribes?
    - Visualization of data
    - Calculation of metrics
    - Putting data in context
- Site planning and sampling
- Training

Field App

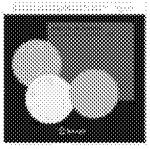
- Elements you'd like to see in the app?

Environmental Monitoring and Assessment
All Volumes & Issues

Topical Collection on Monitoring Wetlands on a Continental Scale: The Technical Basis for the National Wetland Condition Assessment

ISSN: 0167-6369 (Print) 1573-2959 (Online)

ENVIRONMENTAL MONITORING AND ASSESSMENT



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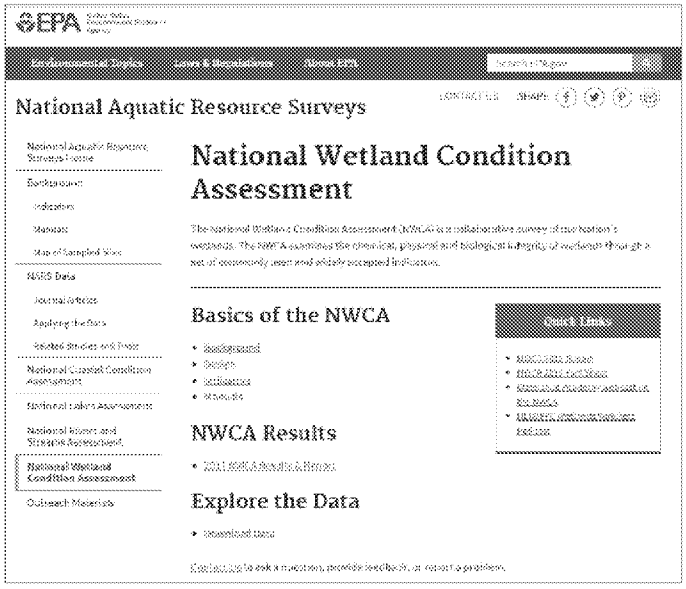
NWCA Web Page



Results, data and information on survey design, indicators, and methods available at:

https://www.epa.gov/national-aquatic-resource-surveys/nwca

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Questions?

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